

In the Matter of )  
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 ) WC Docket No. 17-108  
Restoring Internet Freedom )  
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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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**REPLY COMMENTS OF THE GREENLINING INSTITUTE**

The Greenlining Institute (“Greenlining”) respectfully submits the following reply comments in response to the Federal Communications Commission’s (“Commission”) Notice of Proposed Rulemaking (“NPRM”) in the above-captioned matter.

**I. SUMMARY**

Greenlining is a policy, research, organizing and leadership institute working for racial and economic justice. In its opening comments, Greenlining noted that the existing rules promote racial equity, innovation and investment. In their opening comments, broadband providers and industry groups like the NCTA, Comcast and AT&T argue that competition is sufficient to deter harmful conduct and that deregulation; along with minimal standards are the necessary ingredients for continued investment and innovation in broadband.<sup>1</sup> However, these proposed minimum standards would instead impose higher costs on consumers and content creators, reduce investment in content diversity, widen the digital divide for communities of color, and open the door to corporate censorship and curtailment of individual free speech. If the Commission adopts the proposed rules, communities of color will be priced out of those innovations and will not see those investments. This comment responds to industry claims by outlining

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<sup>1</sup> See Comments of AT&T Services Inc. at 5; Comments of Comcast Corporation at 67-76; Comments of NCTA at 27.

the lack of competition in the broadband market and how the proposed rules will harm investment into communities of color.

## II. ARGUMENT

### A. Lack of Choice and Competition Makes the 2015 Open Internet Rules Necessary to Protect Consumers.

For communities of color – competition and choice for high-speed internet is necessary to drive down prices and close the digital divide.<sup>2</sup> A new competitor's market entry can force providers to lower their rates or increase speeds significantly, giving people access to services that were previously unaffordable.<sup>3</sup> Commenters including AT&T claim that competition renders the 2015 Open Internet Rules unnecessary because customers can switch providers if they engage in anti-consumer conduct.<sup>4</sup> However, competition only works if there are a meaningful number of competitors.

Consumers do not benefit from competition in the broadband market, because consumers suffer from an appalling lack of choice in high-speed internet providers.<sup>5</sup> A competitive broadband market should have at least three broadband providers.<sup>6</sup> However, only 6 percent of U.S. households have access to three providers of 25 Mbps home broadband.<sup>7</sup> Additionally, Low-income households are much less likely to live in neighborhoods with competition and choice.<sup>8</sup> Accordingly, broadband providers are free to engage

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<sup>2</sup> Competition helps close the digital divide for black households by lowering prices and increasing service quality – factors which increase demand and adoption. James E. Prieger, and Wei-Min Hu, *The broadband digital divide and the nexus of race, competition, and quality*, 20 Information economics and Policy 2, 150-167 (2008).

<sup>3</sup> Jacob Davidson, *Google Fiber Has Internet Providers Scrambling to Improve Their Service*, Time (April 13, 2015) available at <http://time.com/money/3820109/google-fiber-has-internet-providers-scrambling-to-improve-their-service/>.

<sup>4</sup> See Comments of AT&T Services Inc. at 5, 22.

<sup>5</sup> The Commission's broadband benchmark speed is 25 Mbps for downloads and 3 Mbps for uploads, and that is the speed used for this analysis. Following Commission precedent, this analysis considers mobile broadband a complement, not a substitute for fixed home broadband.

<sup>6</sup> See Bresnahan, T. F. & P. C. Reiss, *Entry and Competition in Concentrated Markets*, Journal of Political Economy, 99(5), 977- 1009; Xiao, Mo, and Peter F. Orazem. *Does the fourth entrant make any difference?: Entry and competition in the early US broadband market*. 29 International Journal of Industrial Organization 5, 547-561 (2011).

<sup>7</sup> Alex King, Ed Naef, Hal Singer, *Assessing the Impact of Removing Regulatory Barriers on Next Generation Wireless and Wireline Broadband Infrastructure Investment*, Economists Incorporated, 11, fig. 2 (2017) available at <http://ei.com/wp-content/uploads/2017/06/SingerAssessingImpact6.17.pdf>.

<sup>8</sup> 36 percent of the highest-income census blocks had some choice in broadband providers (two or more providers), this dropped to 18 percent for both middle and low-income census blocks. Jonathan Sallet, *Better together*:

in anti-consumer practices without fear of losing customers, especially in poorer neighborhoods. The product of this environment is higher costs, lower adoption, and less investment in infrastructure. Under these conditions, economic theory finds that reasonable regulation, such as the existing rules, can mimic the results of competition and force firms to charge a competitive price – increasing consumer welfare as well as consumption of the regulated good, such as broadband.<sup>9</sup> Therefore, the Commission should not reclassify broadband as proposed in the NPRM.

#### 1. There is Insufficient Competition to Police Anti-Consumer Behavior

The proposed rules would remove a necessary backstop against anti-consumer practices like paid prioritization or other ways of increasing broadband revenues at the expense of affordability, service quality and speed. AT&T claims that “broadband competition is more than capable of disciplining conduct that threatens consumer welfare.”<sup>10</sup> In a market with sufficient choice and competition, that would be true, but the American broadband marketplace is a far from competitive. There are 118 million US households. Of those, 10.6 million have no access to wired Internet service with download speeds of at least 25 Mbps, and an additional 46.1 million households live in areas with just one provider offering those speeds.<sup>11</sup> Therefore, AT&T is describing an alternate reality when it makes hypothetical claims that “if Broadband Provider X began degrading its best effort Internet access platform to favor its “prioritized” content . . . customers would begin switching to those rivals en masse.”<sup>12</sup> That only makes sense when there is a rival. In reality, AT&T or other broadband providers could discriminate against nearly half of U.S. households with impunity due to the lack of meaningful alternatives.

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*Broadband deployment and broadband competition*, The Brookings Institute (March 15, 2017).

<https://www.brookings.edu/blog/techtank/2017/03/15/better-together-broadband-deployment-and-broadband-competition/>; Bill Callahan, *AT&T's Digital Redlining of Cleveland*, National Digital Inclusion Alliance, 1-4 (2017) available at <https://digitalinclusion.org/blog/2017/03/10/atts-digital-redlining-of-cleveland/>.

<sup>9</sup> Jerry Ellig, *Costs and consequences of federal telecommunications regulations*, 58 Fed. Comm. LJ 37, 40 (2006).

<sup>10</sup> See Comments of AT&T Services Inc. at 5.

<sup>11</sup> Alex King, Ed Naef, Hal Singer, *Assessing the Impact of Removing Regulatory Barriers on Next Generation Wireless and Wireline Broadband Infrastructure Investment*, Economists Incorporated, 11, fig. 2 (2017) available at <http://ei.com/wp-content/uploads/2017/06/SingerAssessingImpact6.17.pdf>.

<sup>12</sup> See Comments of AT&T Services Inc. at 42.

This lack of competition is why the Commission cannot substitute clear consumer protections for “competition-facilitating transparency requirements” as some providers have suggested.<sup>13</sup> Under those requirements, the Commission could require consumer disclosures when providers engage in nonstandard network practices, like throttling or blocking. Theoretically this would enable “consumers to vote with their feet if they oppose those practices for any reason.”<sup>14</sup> This “voting” mechanism is theoretical because Commission data shows that 58% of census blocks do not have access to more than one provider of 25 Mbps Internet service.<sup>15</sup> Therefore, for households in those census blocks, there is no option to “vote with their feet” if they want an adequate connection. Providers contribute to this problem by painstakingly avoiding competing in the same areas. For example, in Los Angeles, only 1% of homes are served by more than one cable provider, and only 3% are served by more than one DSL provider.<sup>16</sup> In contrast, cities of similar densities like Paris or Stockholm have five or six competing providers and pay less on a per Mbit basis for their internet service as a result.<sup>17</sup> If this were the competitive landscape in the United States, industry promises that competition will police anti-consumer behavior might actually be credible. Unfortunately that is not the case. In fact, the same commenters that claim competition will discipline their actions are quick to squelch emerging competitors with historic levels of with lawsuits, lobbying and legislation.<sup>18</sup>

## 2. The Lack of Competition Harms Consumers; the Proposed Rules Will Only Exacerbate These Harms.

Providers like Verizon argue, “in the competitive landscape we face, there’s no incentive to harm the customer experience by preventing them from accessing the lawful content they seek...Customers can

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<sup>13</sup> See Comments of AT&T Services Inc. at 8; Comments of NCTA at 27; Comments of Verizon at 19.

<sup>14</sup> See Comments of AT&T Services Inc. at 9.

<sup>15</sup> Wireline Competition Bureau, *Internet Access Services: Status as of June 30, 2016*, FCC, 6 fig. 4 (2017).

<sup>16</sup> Hernán Galperin, Annette M. Kim, François Bar, *Connected Cities and Inclusive Growth, Home Broadband in Los Angeles County*, USC Annenberg, 4 (2017) available at <http://arnicusc.org/wp-content/uploads/2017/02/Policy-Brief-1.pdf>.

<sup>17</sup> Allan Holmes, *U.S. Internet users pay more and have fewer choices than Europeans*, The Center for Public Integrity (April 1, 2015) available at <https://www.publicintegrity.org/2015/04/01/16998/us-internet-users-pay-more-and-have-fewer-choices-europeans>.

<sup>18</sup> See Jon Brodtkin, *Tennessee kills muni-broadband expansion bill after AT&T opposition*, ArsTechnica (March 16, 2016) available at <https://arstechnica.com/tech-policy/2016/03/tennessee-kills-muni-broadband-expansion-bill-after-att-opposition/>.

and do switch providers when they are unsatisfied with their existing provider.”<sup>19</sup> Verizon goes on to state that “Any provider who sought to increase revenue through favoritism or a ‘toll’ on an edge provider would face backlash and the loss of substantial potential lifetime revenues when customers inevitably switched to another provider.”<sup>20</sup> These statements ignore the complete lack of competition and choice of millions for Americans as well as current practices from many providers that objectively “harm the consumer experience.” For example, Level 3 noted that broadband providers that had dominant or exclusive market share in their local market refused to augment capacity on their networks, harming their paying customers.<sup>21</sup>

### 3. Voluntary Commitments and Reputational Costs are Not Sufficient Substitutes for Existing Consumer Protections.

In their comments, nearly all providers pledged to protect the Open Internet even without Title II regulation due to “market forces” and a “deeply engrained commitment to Internet freedom.”<sup>22</sup> Comcast references these market forces when it argues that “[i]f a provider were to block or degrade Internet applications or content, the provider would incur substantial subscriber losses and reputational harm.”<sup>23</sup> However, the threat of subscriber losses and reputational harm does not seem to faze Comcast or other providers from providing sub-par services, including what is generally considered the worst customer service in the United States.<sup>24</sup> It stands to reason that these market forces will not faze providers when it comes to anti-consumer business practices like blocking and throttling. As a result, the Commission should maintain the current Title II protections.

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<sup>19</sup> Comments of Verizon at 10.

<sup>20</sup> *Id.*

<sup>21</sup> Jon Brodtkin, *Level 3 claims six ISPs dropping packets every day over money disputes*, ArsTechnica (March 5, 2014), available at <https://arstechnica.com/information-technology/2014/05/level-3-claims-six-isps-dropping-packets-every-day-over-money-disputes/>

<sup>22</sup> NCTA comments at 51. *See also* Comments of Verizon at 1; Comments of Comcast Corporation at 3; Comments of AT&T Services Inc. at 1.

<sup>23</sup> Comments of Comcast Corporation at 63.

<sup>24</sup> Jon Brodtkin, *ISPs and pay-TV lowest-rated industries, with Comcast worst in sector*, (March 26, 2016) available at <https://arstechnica.com/information-technology/2016/05/isps-and-pay-tv-lowest-rated-industries-with-comcast-worst-in-sector/> (last accessed August 30, 2017).

Consumer polls recently labeled Comcast the “most hated company” in America along with other telecom stalwarts like Charter and Sprint.<sup>25</sup> Comcast received the worst scores in cost to consumer, performance, billing, and reliability in 24/7 Wall St.’s annual customer satisfaction poll, nearly 55% of respondents reported a negative experience with the company, the second worst of any corporation.<sup>26</sup> This culture is attributable to the lack of competition described above. With sufficient choice, Comcast and other providers might actually suffer economically from reputational harm. The survey found that the ISPs, as an industry, had the worst scores in the American Customer Satisfaction Index, underscoring the complete lack of choice and accountability to customers.<sup>27</sup> Therefore, the Commission should ignore claims that, at current levels of competition, reputational harm is sufficient deterrence against anti-consumer practices and instead uphold the 2015 rules.

#### 4. The Proposed Rules Will Result in Subpar Services for Low-Income Households and Communities of Color

Providers argue that the internet has grown and developed without regulation and will continue to remain open and free without Title II because of competition.<sup>28</sup> However, competition, or the lack thereof, has resulted in the development of artificial and anti-consumer practices like data caps on fixed broadband services. If the Commission adopts the new rules, providers will continue to develop artificial restrictions on internet usage, relegating communities of color to a lower class of internet service based on their ability to pay (or lack thereof). Data caps harm the open internet because they curtail the consumption of high bandwidth activities. They impose a de-facto tax on bandwidth, making it harder and more expensive to innovate around the next frontier of applications on the internet and entire digital ecosystem.<sup>29</sup> When bandwidth or an internet experience free from throttling or prioritization is tied to

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<sup>25</sup> Michael B. Sauter and Samuel Stebbins, *America’s Most Hated Companies*, Yahoo Finance (January 10, 2017) available at <https://finance.yahoo.com/news/america-most-hated-companies-110032495.html>

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> See e.g. Comments of AT&T Services Inc. at 5; Comments of Comcast Corporation at 5; Comments of Verizon at 2.

<sup>29</sup> With data caps, designers must make design sacrifices to address users that do not have unlimited bandwidth. See Chetty, Marshini, et al. *You’re capped: understanding the effects of bandwidth caps on broadband use in the home*, Proceedings of the SIGCHI Conference on Human Factors in Computing Systems ACM, 2012. See also

affordability, low-income folks and communities of color will have less access to innovative applications – widening the divide and gap between digital haves and have-nots.

Providers like Comcast state that data caps are based on “fairness” where those that use less pay less.<sup>30</sup> However, the overwhelming majority subscribers to Comcast’s Xfinity broadband service do not see reduced pricing. Instead they run the risk of paying more under the new plan. An additional 50GB of data past Comcast’s or Cox’s data cap costs \$10, to get the same unlimited unmetered service they had before would cost an additional \$50 per month. Comcast’s leaked memos admit that the practice is not about managing congestion – rather it is a way to increase profits without providing any additional value to the customer.<sup>31</sup> Estimates place the actual cost of delivering that data at as low as \$0.03 per gigabyte.<sup>32</sup> For a low-income family using the internet for schoolwork, distance learning or just to enjoy a movie, the prospect of running up overage bills is a serious one that harms internet adoption as well as usage and innovation. If the Commission adopts the proposed rules, paid prioritization and data throttling on home broadband can be added to the list of “fairness” innovations that customers will have to pony up for, notwithstanding the lack of any technical reason for those additional charges.

This practice of imposing higher prices for the same service is at odds with industry comments noting that “rivals have strong incentives to compete fiercely to gain and retain customers even as prices fall because, whenever they lose a customer, they save minimal costs but lose significant revenues.”<sup>33</sup> The proliferation of data caps for fixed broadband services show that pro-consumer incentives do not work

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Allan Holmes et al., *Rich People Have Access to High-Speed Internet; Many Poor People Don’t*, The Huffington Post (May 12, 2016) available at [http://www.huffingtonpost.com/entry/high-speed-internet-center-for-public-integrity-investigation\\_us\\_57333405e4b0bc9cb048a512](http://www.huffingtonpost.com/entry/high-speed-internet-center-for-public-integrity-investigation_us_57333405e4b0bc9cb048a512).

<sup>30</sup> Karl Bode, *Comcast Dramatically Expands Unnecessary Broadband Caps – For ‘Fairness’*, TechDirt (October 7, 2016) available at <https://www.techdirt.com/articles/20161007/05221935735/comcast-dramatically-expands-unnecessary-broadband-caps-fairness.shtml>

<sup>31</sup> *Id.* See also Bill Snyder, *What big ISPs don’t want you to know about data caps*, CIO (May 27, 2016) available at <https://www.cio.com/article/3075975/internet-service-providers/what-big-isps-dont-want-you-to-know-about-data-caps.html> (Dane Jasper, CEO of Sonic, an independent ISP revealed that data caps are not necessary for managing networks, saying “the cost of increasing [broadband] capacity has declined much faster than the increase in data traffic.”)

<sup>32</sup> Joel Hruska, *Comcast now charging for data in 15 states, acknowledges caps aren’t necessary*, ExtremeTech (November 9, 2015) available at <https://www.extremetech.com/internet/217716-comcast-now-charging-for-data-in-15-states-acknowledges-caps-arent-necessary>.

<sup>33</sup> Comments of AT&T Services Inc. at 29-30.



without a competitive market because providers simply are not worried about losing customers when they are the only show in town. Until providers truly compete with one another, the Commission should maintain the existing consumer protections and classification of broadband under Title II.

## **B. The Proposed Rules Will Decrease Investments in Communities of Color**

The Commission is charged with making sure communications services are available “without discrimination on the basis of race, color, religion, national origin, or sex.”<sup>34</sup> However, the Commission has not always been successful in accomplishing this goal. As a result of broadband providers’ business decisions, communities of color suffer from “digital redlining”—those communities generally have less access to broadband services, and where they do have access, those services are generally slower and suffer from lower service quality. One of the primary drivers of digital redlining is income. As a result of the racial wealth and income gaps, people of color are disproportionately low-income. Furthermore, there is a direct correlation between income and broadband service quality. Accordingly, consumers from communities of color, who are disproportionately low-income, generally experience inferior broadband service quality. The proposed rules threaten to exacerbate these problems by reducing the incentive to invest in broadband infrastructure.

Commenters claim that Title II has strangled investment and innovation all the while assuring investors that net neutrality regulations would not affect their investment and capex expenditures.<sup>35</sup> Comcast writes that, under Title II, “ISPs would not have the proper incentives to provide additional network capacity”—which, in turn, “would forestall innovation” and cause “[c]osts for most, if not all, ecosystem participants [to] increase because the regulatory process, not market forces, would define market success.”<sup>36</sup> Market forces, especially for fixed broadband services, already overwhelmingly favor providers at the expense of customers. If the Commission adopts the *Notice*, this dynamic would only worsen – decreasing broadband investment.

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<sup>34</sup> 47 U.S.C. § 151.

<sup>35</sup> See Comments of Free Press at 123.

<sup>36</sup> Comments of Comcast Corporation at 28.

Contrary to what providers claim, the proposed rules create incentives to slow investment in additional network capacity. This is because the rules would lift the prohibition on selling priority access to the network, paid prioritization. Industry commenters furiously argue against rules that limit their ability to prioritize traffic for a fee while ignoring the implications on innovation, and broadband investment.<sup>37</sup> A study found that the value of paid prioritization diminishes at higher network capacities, therefore limiting the incentive to invest in improved broadband infrastructure.<sup>38</sup> Put another way, a toll road, the equivalent of paid prioritization, has little value if there is no congestion on the rest of the highway. Therefore, toll road operators, here the broadband providers, have no interest in adding more lanes. In fact, they have the opposite incentive. Greater congestion would drive increased demand for their toll roads. This tactic of reducing investment to increase profits worked beautifully against transit providers like Level 3.<sup>39</sup> In that case, broadband providers refused to upgrade congested ports for their customers instead preferring to push the cost of upgrades onto other parties, knowing their market power would insulate them from any consequences. These types of disinvestment incentives are constrained by the current rules, removing them and reclassifying broadband will be doubly harmful for communities of color. This is because low-income neighborhoods are already the last to receive broadband investments and network capacity upgrades, if at all.<sup>40</sup> The proposed rules would only exacerbate this practice of digital redlining by giving providers even more avenues and incentives to minimize investment in network infrastructure.

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<sup>37</sup> Comments of AT&T Services Inc. at 5;

<sup>38</sup> “Capacity expansion also affects the sale price of the priority right under the discriminatory regime. Because the relative merit of the first priority, and thus its value, becomes relatively small for higher capacity levels, the ISP’s incentive to invest on capacity under a discriminatory network is smaller than that under a neutral regime, where such rent extraction effects do not exist.” Pil Choi, Jay, and Byung-Cheol Kim. *Net neutrality and investment incentives*, 41 The RAND Journal of Economics 3, 446, 448 (2010)

<sup>39</sup> Jon Brodtkin, *Level 3 claims six ISPs dropping packets every day over money disputes*, ArsTechnica (March 5, 2014), available at <https://arstechnica.com/information-technology/2014/05/level-3-claims-six-isps-dropping-packets-every-day-over-money-disputes/>

<sup>40</sup> For example, analysis from independent sources show AT&T invests in high-income neighborhoods while ignoring low-income ones, resulting in unequal access to new technologies and speeds between wealthy and poor communities. See Garrett Strain, Eli Moore and Samir Gambhir, *AT&T’s Digital Divide in California*, Policy Brief 2017, The Haas Institute (2017); Bill Callahan, *AT&T’s Digital Redlining of Cleveland*, National Digital Inclusion Alliance, 1-4 (2017) available at <https://digitalinclusion.org/blog/2017/03/10/atts-digital-redlining-of-cleveland/>.

### **III. CONCLUSION**

Communities of color and America as a nation must confront a history of redlining policy decisions that resulted in discriminatory access to home loans, education, federal resources and economic opportunity. A crucial part of Greenlining's racial equity work is to reverse the long-term legacy of redlining and the racial wealth gap. Internet access and adoption for communities of color is a key part of that strategy because the internet connects people of color to their communities, to education, jobs and civic discourse. The NPRM's proposed rules are a significant setback to progress in closing the digital divide and racial wealth gap. Broadband providers ignore low-income communities when making investment decisions and consumers, particularly in communities of color, have no power in today's highly concentrated broadband marketplace to demand faster speeds or more affordable services. The proposed rules give providers even more power to grow their revenues by placing barriers and tolls on the open internet through throttling, paid prioritization or blocking. The 2015 Open Internet Order mitigates this unequal power dynamic by ensuring that broadband providers must compete by growing their customer base through greater service quality and affordability instead. Competition based on price and quality is what will help close the digital divide for communities of color, and therefore the Commission should uphold the existing rules.